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8 BlackRock, Inc.; the BlackRock, Inc. Retirement
Committee; Jason Herman; the Administrative
9 Committee of the Retirement Committee; and the
Investment Committee of the Retirement Committee
10

11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13

14 Charles Baird, individually, and on behalf of all
15 others similarly situated, and on behalf of the
BlackRock Retirement Savings Plan,

16 Plaintiff,

17 v.

18 BlackRock Institutional Trust Company, N.A.;
19 BlackRock, Inc.; The BlackRock, Inc.
Retirement Committee; Jason Herman, named
20 Plan Sponsor; John and Jane Does 1-40,
Members of the BlackRock Retirement
Committee; The Administrative Committee of
the Retirement Committee; John and Jane Does
21 1-20, Members of the Administrative
Committee of the Retirement Committee; The
Investment Committee of the Retirement
Committee; John and Jane Does 21-40,
22 Members of the Investment Committee of the
Retirement Committee; each an individual, and
John and Jane Does 41-60, each an individual,
23

24 Defendants.
25

26 Case No. 17-cv-01892-HSG
27

28 **NOTICE OF MOTION AND MOTION
TO DISMISS PLAINTIFF'S CLASS
ACTION COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

**[Declaration of Meaghan VerGow and
Request for Judicial Notice Filed
Concurrently Herewith]**

Hearing Date: September 7, 2017
Time: 2:00 p.m.
Place: Courtroom 2, Oakland Courthouse
Judge: Hon. Haywood S. Gilliam, Jr.

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on September 7, 2017, at 2:00 p.m., or as soon thereafter as
4 the matter may be heard, in Courtroom 2 of the United States District Court for the Northern
5 District of California, located at 1301 Clay Street, Oakland, California, 94612, before the
6 Honorable Haywood S. Gilliam, Jr., defendants BlackRock Institutional Trust Company, N.A.,
7 BlackRock, Inc., the BlackRock, Inc. Retirement Committee, Jason Herman, the Administrative
8 Committee of the Retirement Committee, and the Investment Committee of the Retirement
9 Committee (together, “BlackRock”) will and hereby do move pursuant to Federal Rules of Civil
10 Procedure 12(b)(1) and 12(b)(6) for dismissal of the Class Action Complaint filed by plaintiff
11 Charles Baird.

12 The motion is made on the grounds that plaintiff lacks Article III standing as to claims
13 regarding funds in which he never invested, which are the primary focus of his Complaint. The
14 motion is also made on the grounds that plaintiff has failed to plausibly allege that defendants
15 breached any fiduciary duties or caused the prohibited transaction violations he alleges, and that
16 the Complaint is improperly brought against certain defendants.

17 The motion is made pursuant to the stipulated Order regarding timing entered by the Court
18 on April 27, 2017 (ECF No. 28) and is based on this notice of motion and motion, the
19 accompanying memorandum of points and authorities, the declaration of Meaghan VerGow with
20 exhibits thereto and the request for judicial notice filed concurrently herewith, all records and
21 pleadings on file with the Court, all further evidence and oral argument that may be presented at
22 the hearing on this motion, and all other matters as the Court deems proper.

Dated: June 1, 2017

O'MELVENY & MYERS LLP

By: /s/ Brian D. Boyle
Brian D. Boyle

Attorneys for Defendants

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

3 BlackRock, Inc. sponsors a 401(k) plan with extraordinarily low costs of participation.
4 BlackRock itself covers the plan-level administrative and recordkeeping expenses (which many
5 other plans charge to participants). And the BlackRock-affiliated manager of the plan's collective
6 trust investments—constituting the substantial majority of investment options offered to plan
7 participants—has *waived* its investment management fees for the plan. BlackRock collective
8 trusts are a leading choice for the fiduciaries of other large 401(k) plans; BlackRock plan
9 participants have access to those investment products for virtually nothing, substantially
10 enhancing their ability to grow their retirement savings.

11 Against this backdrop, plaintiff alleges—in the latest cookie-cutter pleading targeting the
12 offering of proprietary products in a 401(k) plan—that the fees paid by participants were
13 “excessive.” Plaintiff’s misbegotten attack on the BlackRock 401(k) plan is built on a series of
14 factual errors (which are betrayed by the materials the Complaint relies upon), flawed
15 comparisons, and conclusory allegations that wither under scrutiny. Plaintiff’s misunderstanding
16 of the plan’s fees is only the beginning of the Complaint’s problems.

17 The threshold failing of the Complaint is that plaintiff lacks Article III standing to bring
18 any of the claims that dominate his pleading. Plaintiff did not himself invest in the target date
19 funds or Low Duration Bond Fund that are his primary targets. The plan's investment in these
20 funds thus caused plaintiff no injury in fact, and his challenges to those funds are constitutionally
21 deficient. Equally clearly, plaintiff cannot link these deficient claims to the fund challenges he
22 does have standing to bring (were any to survive), as the claims are not substantially similar to
23 each other.

24 The Complaint fails to state any claim under the Employee Retirement Income Security
25 Act of 1974 (“ERISA”) in any event. Plaintiff contends that BlackRock disloyally and
26 imprudently selected the BlackRock-affiliated LifePath Funds to enlarge its own fees, but
27 plaintiff has his facts wrong. As noted, the plan does not pay any investment management fees
28 for the LifePath Funds, or any other collective trusts in the investment lineup. Plaintiff’s

1 allegation that the plan invests in a fee-bearing share class for these funds is explicitly
 2 contradicted by the very documents he cites for that proposition.

3 Plaintiff's theory that the LifePath Funds were selected disloyally evaporates with the
 4 failure of his fee allegations. There is nothing inherently suspect about an asset manager offering
 5 to its own 401(k) plan the investment products it makes available to other retirement plans, as
 6 ERISA expressly authorizes it to do. Nor can fiduciary imprudence be inferred from other
 7 allegations in the Complaint—if anything, the fiduciaries' achievement in procuring these
 8 enormously popular, successful investment options on a fee-free basis compels the opposite
 9 inference. The Complaint's conclusory jabs at the performance of the LifePath Funds add
 10 nothing: plaintiff alleges no facts to question the prudence of the Funds' distinctive investment
 11 strategy, and his performance comparison to other funds with different strategies fails because
 12 ERISA does not judge fiduciary decisionmaking in hindsight, as courts consistently hold in
 13 dismissing complaints that rest on similar grounds.

14 Likewise implausible are plaintiff's attacks on the handful of mutual funds included in the
 15 plan during the class period (which have been reduced to one over time, in favor of the fee-free
 16 collective trusts). Plaintiff asserts that the fees and performance of the Low Duration Bond Fund
 17 were inferior to those of a Vanguard fund. A comparison to a single fund alternative could never
 18 support an inference of fiduciary breach; it is well established that fiduciaries need not “scour the
 19 market” to pick the cheapest possible fund, and prudence is not judged in hindsight. But here the
 20 comparison is literally meaningless because the Vanguard fund plaintiff highlights is a *different*
 21 *type of fund*, as the face of the Complaint makes obvious. Plaintiff does not allege that the
 22 investment strategy pursued by the Low Duration Bond Fund had no place in the plan's diverse
 23 investment lineup, and thus he offers no basis to question the fiduciary decision to include it.

24 The fatal defects in plaintiff's challenge to the Global Allocation Fund likewise leap out
 25 from the face of the Complaint. Plaintiff asserts that this mutual fund was more expensive than
 26 two comparable funds to which a BlackRock affiliate provided sub-advisory services. Once
 27 again, plaintiff's conclusory comparison does not establish that the Global Allocation Fund bore
 28 an excessive expense ratio for this type of strategy (the Fund's success with investors suggests

1 just the opposite). Worse, the funds to which plaintiff compares the Global Allocation Fund *were*
 2 *more expensive*. It hardly requires explanation that plaintiff thus fails to plausibly allege a claim
 3 that the fiduciaries failed to pay proper attention to the fees for this fund.

4 Plaintiff's final set of claims asserts that the plan's inclusion of affiliated investment
 5 products violated ERISA's prohibited transaction provisions. Every fund in which plaintiff
 6 himself invested was added more than six years before this lawsuit was filed, however, and the
 7 features plaintiff now challenges—the funds' fees and affiliation with BlackRock—were always
 8 openly disclosed. Plaintiff's claims are accordingly untimely both under ERISA's three-year
 9 statute of limitations (barring claims brought more than three years after a plaintiff acquired
 10 actual knowledge of them) and under ERISA's six-year statute of repose (barring claims brought
 11 more than six years after the challenged fiduciary decision occurred). Even if plaintiff's
 12 prohibited transaction claims were not time-barred, they still would have to be dismissed.
 13 Plaintiff cannot even articulate a prohibited transaction as to the fee-free collective trusts, and the
 14 Complaint establishes that all of the plan's affiliated offerings are expressly exempted from the
 15 prohibited transaction provisions.

16 Plaintiff's Complaint is meritless and its many defects cannot be cured by amendment.
 17 This action should be dismissed with prejudice.

18 **BACKGROUND AND FACTUAL ALLEGATIONS**

19 Blackrock, Inc. is the world's largest asset manager, with over \$5 trillion in assets under
 20 management. Class Action Complaint ("Compl.") ¶ 5 (ECF No. 1). BlackRock sponsors a
 21 defined contribution retirement plan (the BlackRock Retirement Savings Plan, or the "Plan"), to
 22 help employees save for retirement, funded by salary deferrals and contributions from
 23 BlackRock. *Id.* ¶¶ 3, 5. While most plans pay operational costs out of plan assets (as ERISA
 24 permits), BlackRock bears virtually all of the Plan's costs itself: most of the Plan's assets are
 25 invested in collective trusts for which BlackRock's investment management fees are waived (*see*
 26 *infra* at 11), and BlackRock pays for the Plan's administrative services out of its own assets, *see*
 27 Declaration of Meaghan VerGow in Support of BlackRock's Motion to Dismiss ("VerGow
 28

1 Decl.”), Ex. D (“2015 RSP Form 5500”), at 90.¹ These extraordinary concessions substantially
 2 lower the cost of participation in the Plan. Approximately 9,700 current and former employees
 3 participate in the Plan. Compl. ¶ 5. As of 2015, the Plan had roughly \$1.56 billion in assets. *Id.*

4 The Plan’s administrator is the BlackRock, Inc. Retirement Committee. *Id.* ¶ 46. The
 5 BlackRock, Inc. Investment Committee, a subcommittee of the Retirement Committee, is
 6 responsible for selecting and monitoring the investment options that are made available to
 7 participants for the investment of their individual accounts. *Id.* ¶¶ 50, 62, 67. The BlackRock,
 8 Inc. Administrative Committee, another subcommittee of the Retirement Committee, is
 9 responsible for issues of plan administration. *Id.* ¶ 52.

10 During the class period, the Plan lineup included more than two dozen core investment
 11 options, some managed by BlackRock affiliates and others managed by independent asset
 12 managers. The options have consistently reflected a broad range of asset classes, risk profiles,
 13 and investment strategies. *See id.* ¶ 66; VerGow Decl., Ex. C (“2011 RSP Form 5500”), at 56–
 14 57; 2015 RSP Form 5500, at 77–79.² The vast majority of those options are the no-fee collective
 15 trusts managed by BlackRock Institutional Trust Company (“BTC”). *See, e.g.*, 2015 RSP Form
 16 5500 at 91. The Plan currently offers one mutual fund managed by a BlackRock affiliate, the
 17 Low Duration Bond Fund. VerGow Decl., Ex. O (“Mar. 2017 Participant Fee Disclosure”).
 18 Earlier in the class period, the Plan offered two other BlackRock-affiliated mutual funds—the
 19 Total Return Fund and the Global Allocation Fund—but the Plan now offers those strategies
 20 through collective trusts. *Compare id.* at 266–67, with 2011 RSP Form 5500, at 69.³ During the
 21 class period the Plan also offered several mutual funds managed by unaffiliated third parties. *See,*
 22

23 ¹ As explained more fully *infra* at 6 and in the accompanying Request for Judicial Notice, the
 24 Court may properly consider the documents that are incorporated into the Complaint or otherwise
 25 judicially noticeable.

26 ² The Plan’s investment lineup meets the regulatory specifications for an “ERISA section 404(c)
 27 plan,” as it offers a broad range of investment alternatives with at least three diversified options
 28 that have materially different risk and return characteristics. *See* 29 C.F.R. § 2550.404c-1(b).

³ Mutual funds are pooled investment vehicles that are overseen by registered investment
 27 companies and subject to the regulatory supervision of the Securities and Exchange Commission
 28 (“SEC”); collective trusts are also pooled investment vehicles, but they are administered by a
 bank or trust company and are not regulated by the SEC. *E.g.*, 15 U.S.C. § 80a-3(a), (c)(11).

e.g., 2015 RSP Form 5500, at 91.

Plaintiff Charles Baird is a former BlackRock employee who continues to participate in the Plan. Compl. ¶¶ 28, 30. He filed this putative class action on April 5, 2017, alleging that the Plan’s fiduciaries breached their fiduciary duties of loyalty and prudence in selecting and monitoring investment options managed by BlackRock affiliates in the Plan’s investment lineup. *Id.* ¶¶ 191–212. In particular, plaintiff alleges that the BlackRock LifePath target date funds in the lineup charged excessive fees, and that they underperformed other target date options during this period. *See, e.g., id.* ¶¶ 110, 201. Plaintiff also challenges the Plan’s Low Duration Bond Fund and Global Allocation Fund options as unduly costly, *see id.* ¶¶ 156, 143–51, and makes cursory complaints about the fees of other Plan options, *see id.* ¶¶ 130–38, 165–70. The Complaint asserts claims for fiduciary breach, prohibited transactions, failure to monitor other fiduciaries, and co-fiduciary liability. *See generally id.* ¶¶ 191–249.

LEGAL STANDARD

At the threshold, a plaintiff must establish that he has Article III standing to seek relief in federal court. *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1126 (9th Cir. 2006). If the plaintiff does not carry his burden of establishing standing with respect to a claim, that claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). *Munns v. Kerry*, 782 F.3d 402, 409 (9th Cir. 2015). When “considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence . . . to resolve factual disputes concerning the existence of jurisdiction.” *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); *accord Mahtesian v. U.S. Office of Pers. Mgmt.*, 388 F. Supp. 2d 1047, 1047 (N.D. Cal. 2005).

In the ERISA context, a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is an “important mechanism for weeding out meritless claims.” *Fifth-Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014). “To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege enough facts to state a claim to relief that is plausible on its face.” *Turner v. City & Cty. of S.F.*, 788 F.3d 1206, 1210 (9th Cir. 2015) (quoting *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008)); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570

1 (2007). The court need not accept conclusory allegations, unreasonable inferences, or legal
 2 conclusions set out in the form of factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 681
 3 (2009); *see also Twombly*, 550 U.S. at 555 (“plaintiff’s obligation to provide the ‘grounds’ of his
 4 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of
 5 the elements of a cause of action will not do” (citation omitted)). Plausibility requires “more than
 6 a sheer possibility that a defendant has acted unlawfully.” *Turner*, 788 F.3d at 1210 (quoting
 7 *Iqbal*, 556 U.S. at 678).

8 When resolving “a Rule 12(b)(6) motion to dismiss,” the Court “must consider the
 9 complaint in its entirety, as well as . . . documents incorporated . . . by reference, and matters of
 10 which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S.
 11 308, 322 (2007); *see also Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (recognizing that
 12 the “incorporation by reference” doctrine extends to situations “in which the plaintiff’s claim
 13 depends on the contents of a document, the defendant attaches the document to its motion to
 14 dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff
 15 does not explicitly allege the contents of that document in the complaint”). Here, documents
 16 relating to the Plan may be considered in connection with BlackRock’s arguments under Fed. R.
 17 Civ. P. 12(b)(6) because they are incorporated into, and centrally related to, plaintiff’s allegations
 18 about the Plan’s investment options and expenses. *See Lorenz v. Safeway, Inc.*, No. 16-CV-
 19 04903-JST, 2017 WL 952883, at *3 (N.D. Cal. Mar. 13, 2017) (taking judicial notice of plan
 20 document, summary plan descriptions, Form 5500 filings submitted to the Department of Labor,
 21 participant fee disclosure notices, and a master services agreement, noting that “[c]ourts routinely
 22 take judicial notice of ERISA plan documents like those”).⁴

23 ⁴ *See also*, e.g., *Watkins v. Citigroup Ret. Sys.*, No. 15-CV-731-DMS, 2015 WL 9581838, at *2
 24 (S.D. Cal. Dec. 30, 2015) (taking judicial notice of ERISA plan document on motion to dismiss);
 25 *Urakhchin v. Allianz Asset Mgmt. of Am. L.P.*, No. SACV 15-1614-JLS, 2016 WL 4507117, at
 26 *3–4 (C.D. Cal. Aug. 5, 2016) (same); *Care First Surgical Ctr. v. ILWU-PMA Welfare Plan*, No.
 27 CV 14-01480 (MMM), 2014 WL 6603761, at *4 (C.D. Cal. July 28, 2014) (same); *Koblenz v.*
 28 *UPS Flexible Emp. Benefit Plan*, No. 12-CV-0107-LAB, 2013 WL 4525432, at *1–2 (S.D. Cal.
 Aug. 23, 2013) (same); *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1025 (N.D. Cal. 2014)
 (taking judicial notice of “aspects of a publicly accessible website”); *Norfolk Cty. Ret. Sys. v.*
Solazyme, Inc., No. 15-CV-02938-HSG, 2016 WL 7475555, at *1 n.1 (N.D. Cal. Dec. 29, 2016)
 (taking judicial notice of filings with the U.S. Securities and Exchange Commission).

ARGUMENT

I. PLAINTIFF LACKS STANDING TO BRING CLAIMS CHALLENGING FUNDS HE NEVER SELECTED FOR HIS OWN PLAN ACCOUNT

Plaintiff lacks Article III standing to attack the BlackRock-affiliated Plan investment options in which he did not personally invest, including the funds that are the primary focus of his Complaint: the LifePath Funds and the Low Duration Bond Fund.

Article III standing requires a plaintiff to show he has been personally injured by the challenged conduct. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 n.1 (1992) (a constitutionally sufficient injury in fact must “affect the plaintiff in a personal and individual way”); *Glanton*, 465 F.3d at 1126 (affirming dismissal of ERISA suit for lack of standing); *see also Jones v. Nutiva, Inc.*, No. 16-CV-00711-HSG, 2016 WL 5210935, at *5 (N.D. Cal. Sept. 22, 2016) (Gilliam, J.) (dismissing deceptive labeling claims with respect to products the plaintiff did not purchase because he lacked standing as to them). In a defined contribution plan, a participant can be personally injured by conduct regarding a fund in the plan’s investment lineup only if he selected that fund for his own plan account. *See, e.g., LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 250 & n.1 (2008) (explaining individual nature of defined contribution accounts); *Bendaoud v. Hodgson*, 578 F. Supp. 2d 257, 264 (D. Mass. 2008) (“[I]f an asset in a defined contribution plan is harmed, the loss is not spread. It is visited entirely on the participant or participants who hold the impaired asset.”). Courts thus routinely dismiss claims relating to the selection or management of funds in which the plaintiff did not herself invest. *See, e.g., Caltagirone v. N.Y. Cty. Bancorp, Inc.*, 257 F. App’x 470, 473 (2d Cir. 2007) (holding that the plaintiff lacked standing to challenge shares she never held because she “is not within the group she defines as injured as a result of the alleged fiduciary breaches”); *In re UBS Erisa Litig.*, No. 08-CV-6696 (RJS), 2014 WL 4812387, at *7 (S.D.N.Y. Sept. 29, 2014), *aff’d sub nom. Taveras v. UBS AG*, 612 F. App’x 27 (2d Cir. 2015) (similar).⁵

⁵ See also, e.g., *In re Meridian Funds Grp. Sec. & Emp. Ret. Income Sec. Act (ERISA) Litig.*, 917 F. Supp. 2d 231, 235 (S.D.N.Y. 2013) (dismissing ERISA claims as to funds plaintiff did not invest in); *Yost v. First Horizon Nat'l Corp.*, No. 08-2293-STA-CGC, 2011 WL 2182262, at *6 (W.D. Tenn. June 3, 2011) (noting it is “axiomatic” that a plaintiff lacks standing to sue for breach of fiduciary duty with respect to a fund in which he “never had any holdings”); compare

1 Plaintiff complains at length that the LifePath Funds and Low Duration Bond Fund were
 2 imprudent options for the Plan. Compl. ¶¶ 17, 19–21, 82–129, 154–68. But plaintiff’s participant
 3 statements establish that he did not invest in those funds, or in others that he challenges in passing
 4 (*see, e.g., id.* ¶¶ 134–36). *See* VerGow Decl., Ex. A (“Plan Participant Statements”). The Plan
 5 fiduciaries’ decisions to select and retain these investment options necessarily caused plaintiff no
 6 injury. Plaintiff accordingly lacks Article III standing to challenge those funds and claims
 7 respecting them must be dismissed.⁶ Plaintiff’s Complaint can survive at all only if plaintiff is
 8 able to state plausible claims with respect to the few funds in which he actually did invest. *See In*
 9 *re UBS Erisa Litig.*, 2014 WL 4812387, at *6 (“Plaintiff can only demonstrate a constitutionally
 10 sufficient injury by pointing to her individual account’s specific losses during the class period.”)
 11 (emphasis omitted)).⁷ As explained in the following sections, plaintiff cannot come close to
 12 doing so.

13 Plaintiff’s lack of constitutional standing is not excused because he filed a putative class
 14 complaint, because the defective claims are not “substantially similar” to claims as to which
 15 plaintiff has a demonstrated personal stake. *Jones*, 2016 WL 5210935, at *5; *Gallagher v.*
 16 *Chipotle Mexican Grill, Inc.*, No. 15-CV-03952-HSG, 2016 WL 454083, at *3 (N.D. Cal. Feb. 5,
 17 2016) (Gilliam, J.) (dismissing claims for lack of standing).⁸ Plaintiff’s claims with respect to

19 *Urakhchin*, 2016 WL 4507117 (holding that the plaintiff had standing to challenge planwide
 20 practices). Courts likewise recognize in the securities context that plaintiffs bringing fraud claims
 21 lack standing to challenge funds in which they did not invest. *See, e.g., Siemers v. Wells Fargo &*
 22 *Co.*, No. C 05-04518 WHA, 2006 WL 3041090, at *7 (N.D. Cal. Oct. 24, 2006) (collecting
 23 cases); *Me. State Ret. Sys. v. Countrywide Fin. Corp.*, 722 F. Supp. 2d 1157, 1163 (C.D. Cal.
 24 2010); *In re Wells Fargo Mortg.-Backed Certificates Litig.*, 712 F. Supp. 2d 958, 965 (N.D. Cal.
 25 2010).

26 ⁶ Statutory standing principles apply similarly here. As explained in *LaRue*, an ERISA plaintiff is
 27 not authorized to bring a claim under 29 U.S.C. § 1132(a)(2) if her individual account has not
 28 been affected by the challenged conduct. *See LaRue*, 552 U.S. at 256 (“§ 502(a)(2) . . .
 29 authorize[s] recovery for fiduciary breaches that impair the value of plan assets in a participant’s
 30 individual account”).

31 ⁷ The only fund to which plaintiff actually allocated his account that receives more than a passing
 32 reference in the Complaint is the Global Allocation Fund, and his claim with respect to that fund
 33 fails under Fed. R. Civ. P. 12(b)(6) for reasons discussed *infra* at 15–16.

34 ⁸ *See also, e.g., Miller v. Ghirardelli Chocolate Co.*, 912 F. Supp. 2d 861, 869–70 (N.D. Cal.
 35 2012); *Romero v. HP, Inc.*, No. 16-CV-05415-LHK, 2017 WL 386237, at *7–8 (N.D. Cal.

1 each fund in the Complaint turn on distinct features of each fund, distinct fiduciary decisions, and
 2 distinct alleged breaches. Plaintiff's own Complaint makes that clear, by separately alleging
 3 unique fiduciary breaches based on the particular characteristics of each of the funds he
 4 challenges. *See* Compl. ¶¶ 82–138 (BlackRock LifePath Funds), 139–53 (BlackRock Global
 5 Allocation Fund), 154–64 (BlackRock Low Duration Bond Fund), 165 (BlackRock Total Return
 6 Fund), 167–68 (US Debt Index Fund). The question whether the fiduciaries prudently monitored
 7 the performance of the LifePath Funds, for example, is different from (and would turn on a
 8 different factual record from) the question whether the fiduciaries prudently decided the Global
 9 Allocation Fund was an appropriate choice for the Plan in view of its expense ratio. *Cf.*, e.g.,
 10 *White v. Chevron Corp.*, No. 16-CV-0793-PJH, 2016 WL 4502808, at *15–18 (N.D. Cal.
 11 Aug. 29, 2016) (“*White I*”) (separately analyzing distinct challenges to different funds); *Tibble v.*
 12 *Edison Int'l*, 639 F. Supp. 2d 1074, 1115–19 (C.D. Cal. 2009) (same), *vacated and remanded on*
 13 *other grounds*, 843 F.3d 1187 (9th Cir. 2016). Plaintiff will not be able to establish that he is an
 14 appropriate class representative with respect to the funds he never had a stake in, including the
 15 LifePath and Low Duration Bond Funds, and thus his purported claims as to such funds should be
 16 dismissed.

17 **II. THE COMPLAINT DOES NOT STATE A CLAIM FOR FIDUCIARY BREACH**

18 ERISA's fiduciary standard is process-driven: fiduciaries must carry out their functions
 19 loyally and “with the care, skill, prudence, and diligence under the circumstances then prevailing”
 20 that a prudent fiduciary would use. 29 U.S.C. § 1104(a)(1)(A), (B).⁹ The Complaint permits no
 21 inference of a deficient fiduciary process here. Plaintiff's primary basis for claiming a lapse in
 22 fiduciary process is that the Plan bears excessive fees, but his allegations are both demonstrably
 23 wrong and legally insufficient: the Plan is not charged *any* investment management fees for its
 24 investments in affiliated collective trusts, and it offered the lowest-cost share class of affiliated

25 Jan. 27, 2017); *Larsen v. Trader Joe's Co.*, No. C 11-05188 SI, 2012 WL 5458396, at *5 (N.D.
 26 Cal. June 14, 2012).

27 ⁹ See also, e.g., *Kanawi v. Bechtel Corp.*, 590 F. Supp. 2d 1213, 1221, 1229–30 (N.D. Cal. 2008)
 28 (key to prudence is “the thoroughness of the fiduciary's decision making process”); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996) (the ERISA prudence standard “focus[es] on a
 fiduciary's conduct in arriving at an investment decision, not on its results”).

1 mutual funds that have been the first choice of many other retirement fiduciaries. And while
 2 plaintiff also attempts to allege an imprudent fiduciary process by comparing the performance of
 3 some of the funds to that of other funds in the market, courts consistently recognize that hindsight
 4 critiques cannot sustain a claim for fiduciary breach under the ERISA § 404(a) standard, which
 5 focuses on the fiduciary's conduct, not its results. *See, e.g., Kanawi*, 590 F. Supp. 2d at 1229–30
 6 (“20/20 hindsight musings are not sufficient to maintain a cause of action alleging a breach of
 7 fiduciary duty”); *St. Vincent Catholic Med. Ctrs. ex rel. PBGC v. Morgan Stanley Inv. Mgmt., Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) (“We judge a fiduciary’s actions based upon information
 8 available to the fiduciary at the time of each investment decision and not from the vantage point
 9 of hindsight.” (alteration and citation omitted)). Because plaintiff’s Complaint includes not a
 10 single allegation that calls the fiduciaries’ decisionmaking process into question, his claims for
 11 fiduciary breach should be dismissed. *See Duedenhoeffer*, 134 S. Ct. at 2473 (explaining that
 12 claims for fiduciary breach under ERISA should be dismissed if the plaintiff does not plausibly
 13 allege that a prudent fiduciary “could not have concluded” that the challenged decision was
 14 appropriate).¹⁰

16 **A. Plaintiff Does Not Plausibly Allege Any Defect In The Fiduciaries’ Process
 17 For Selecting And Monitoring The Plan’s Collective Trust Options**

18 The Complaint’s central claim concerns the BlackRock LifePath Funds, the target date
 19 collective trusts offered to Plan participants during the class period. Plaintiff never personally
 20 invested in these funds, as noted earlier, but nevertheless alleges that the LifePath Funds charged
 21 the Plan excessive fees by investing in multiple layers of BlackRock-affiliated funds, *see Compl.*
 22 ¶¶ 83–105, 134, and that the LifePath Funds underperformed certain target date fund alternatives,
 23 *see id.* ¶¶ 86, 106–29. These allegations do not plausibly support a claim that the fiduciaries

24 ¹⁰ *See also, e.g., White I*, 2016 WL 4502808, at *19 (granting motion to dismiss where “[t]he facts
 25 as pled do not raise a plausible inference that defendants breached their fiduciary duties and/or
 26 duties of loyalty and prudence”); *In re Disney ERISA Litig.*, No. CV 16-2251 PA (JCX), 2016
 27 WL 8192945, at *4 (C.D. Cal. Nov. 14, 2016) (granting motion to dismiss where “[p]laintiffs
 28 have alleged no facts plausibly suggesting any sort of self-dealing or other disloyal conduct by the
 Plan or the individual members of the Plan’s committee”); *Barchock v. CVS Health Corp.*, C. A.
 No. 16-061-ML, 2017 WL 1382517, at *5 (D.R.I. Apr. 18, 2017) (dismissing complaint alleging
 breach of fiduciary duties based on a “hindsight” comparison of investment option to industry
 averages), *appeal filed*, No. 17-1515 (1st Cir. May 23, 2017).

1 followed defective processes in selecting and retaining these funds.

2 To begin, plaintiff's attempt to rely on the fees charged by the affiliated collective trusts to
 3 question the motives of the fiduciaries in including the investments fails for the simple reason that
 4 no such fees are paid to BlackRock entities for these investments. VerGow Decl., Ex. J
 5 (Guideline and Fee Agreement ("GLFA")), at 197–98 (reflecting agreement that investment
 6 management services will be provided on a "[g]ross of [f]ee" basis); *id.* Ex. K (Investment
 7 Management Agreement ("IMA")), at 201–02 (incorporating the GLFA); *see also, e.g.*, 2015 RSP
 8 Form 5500, at 73–76 (confirming that no BlackRock entity received direct or indirect
 9 compensation for services to the Plan).¹¹ Plaintiff contends that the Plan invests in share classes
 10 of the affiliated collective trusts that do pay investment management fees to BlackRock, citing as
 11 support the Plan's publicly filed Form 5500s, *see Compl. ¶¶ 90, 167*, but those annual reports
 12 flatly refute the contention. The Complaint alleges that the Plan was invested in the "M Class" of
 13 the LifePath Funds, for example, but the Plan's Form 5500s show that the Plan invests in the fee-
 14 free F Class. *Compare Compl. ¶ 90, with 2015 RSP Form 5500, at 77, 79* (identifying the Plan's
 15 investment in the F Class of the LifePath Funds). The Plan's Form 5500s likewise refute
 16 plaintiff's allegation that the Plan was invested in the "W Class" of the U.S. Debt Index Fund.
 17 *Compare Compl. ¶ 167, with 2015 RSP Form 5500, at 78* (identifying the Plan's investment in
 18 the F Class of the U.S. Debt Index Fund). Given that *plaintiff himself* cites these forms as the
 19 *source* of his fee allegations, he does not and in good faith could not allege that they are
 20 incorrect.¹²

21 Plaintiff implies that the mere fact that the collective trusts are managed by a BlackRock

22 ¹¹ The Plan pays only pass-through administrative costs, such as custodial fees; those fees are
 23 remitted to third-party service providers, not BlackRock, and were capped at 2 basis points or less
 24 (*i.e.*, two-hundredths of one percent) during the entire class period. *See* GLFA at 198. The Form
 25 5500s and annual financial reports for the individual collective trusts confirm that total
 26 administrative expenses for each collective trust remained under this cap. *See, e.g.*, VerGow
 27 Decl., Ex. E ("2015 LifePath Index 2035 Fund Form 5500 Filings"), at 102–04; *id.* Ex. L
 28 (financial reporting for F-Class funds).

29 ¹² The Complaint offers conclusory attacks on other collective trusts in the Plan lineup. *See*
 30 *Compl. ¶¶ 130–38*. These attacks focus entirely on the collective trusts' alleged investment
 31 management fees and founder because no such fees were paid to BlackRock affiliates, as
 32 explained in the text.

1 affiliate is sufficient to infer a disloyal fiduciary process. But shorn of plaintiff's deficient fee
 2 allegation, the suggestion makes no sense. ERISA explicitly permits financial services
 3 companies to make their own products available for investment in their retirement accounts—
 4 even when they actually charge fees for doing so, *see* 29 U.S.C. § 1108—because Congress
 5 recognized that “it would be contrary to normal business practice for a company whose business
 6 is financial management to seek financial management services from a competitor.” Notice of
 7 Proposed Rulemaking, Participant Directed Individual Account Plans, 56 Fed. Reg. 10724, 10730
 8 (Mar. 13, 1991); H.R. Conf. Rep. No. 93-1280 (Aug. 12, 1974), *reprinted in* 1974 U.S.C.C.A.N.
 9 5038, 5094 (same); *see also, e.g.*, PTE 77-3, Class Exemption Involving Mutual Fund In-House
 10 Plans Requested by the Investment Company Institute, 42 Fed. Reg. 18,734, 18,734–35 (Apr. 8,
 11 1977). Fiduciaries may wish to offer proprietary products in their employee retirement plans for
 12 a variety of good reasons, including their familiarity with the investment managers and
 13 confidence in “their abilities and responsiveness.” *Dupree v. Prudential Ins. Co. of Am.*, No. 99-
 14 8337-Civ.-JORDAN, 2007 WL 2263892, at *10 (S.D. Fla. Aug. 10, 2007). Moreover, as the
 15 Complaint itself acknowledges, BlackRock is the largest and most popular asset manager in the
 16 world, attracting trillions of dollars in investment. Compl. ¶ 5. Much of that is from Fortune 500
 17 retirement plans whose fiduciaries each likewise have concluded that BlackRock LifePath Funds
 18 are a prudent choice for their plans. *See, e.g.*, 2015 LifePath Index 2035 Fund Form 5500 Filings,
 19 at 96, 97, 136 (reflecting investments by plans sponsored by Delta Airlines, Barclays Bank,
 20 CitiGroup, Burger King, and others). Here, the Plan fiduciaries obtained these high-quality funds
 21 for the Plan on extraordinarily favorable terms. No inference of disloyal or imprudent
 22 decisionmaking is possible from the Plan's selection of the proprietary collective trust investment
 23 choices.

24 What is left in the Complaint is the allegation that the LifePath Funds “underperformed”
 25 various alternatives over the class period. Compl. ¶ 110. But this impermissible hindsight
 26 critique does not support any inference that the Plan fiduciaries, “*at the time they engaged in the*
 27 *challenged transactions, [failed to] employ[]* the appropriate methods to investigate the merits of
 28 the investment.” *White I*, 2016 WL 4502808, at *6 (emphasis added; citing *Tibble v. Edison Int'l*,

1 729 F.3d 1110, 1136 (9th Cir. 2013) (“*Tibble I*”), *vacated on other grounds*, 135 S. Ct. 1823
 2 (2015)); *see supra* at 10. Even accepting at face value plaintiff’s allegation that the LifePath
 3 Funds have not, in retrospect, produced returns matching those of some other target date offerings
 4 over the past six years, that allegation does not support the conclusion that the Investment
 5 Committee used imprudent methods to select these funds for the BlackRock Plan. *St. Vincent*,
 6 712 F.3d at 721–24 (dismissing claims based on a backward-looking critique of performance).
 7 Target date funds do not follow a single common investment strategy for allocating risk over the
 8 life of the funds, which may be as long as 45 years (covering a variety of market environments,
 9 from bull to bear); rather, they vary in their “glide paths.” *See* SEC and DOL, Notice of Hearing,
 10 Hearing on Target Date Funds and Similar Investment Options, at 1–2 (May 19, 2009),
 11 <https://www.sec.gov/rules/other/2009/ic-28725.pdf> (“‘Target date’ or ‘lifecycle’ funds and other
 12 similar investment options . . . are investment products that allocate their investments among
 13 various asset classes and automatically shift that allocation to more conservative investments as a
 14 ‘target’ date approaches. This shift in asset allocation, often referred to as a fund’s ‘glide path,’
 15 may differ significantly among funds with the same target date.”); Compl. ¶ 66. As it happens,
 16 the LifePath Funds, with their distinctive risk-management approach, are a popular choice for
 17 401(k) plan fiduciaries—several hundred plans offer the funds as their target-date strategies. *See*
 18 generally 2015 LifePath Index 2035 Fund Form 5500 Filings (excerpts from 2015 LifePath Index
 19 2035 Fund 5500s for all share classes, showing all invested plans). This presumably explains
 20 why plaintiff is unable to offer any critique of how the LifePath glide paths allocate risk over the
 21 life of the fund, except to point out after-the-fact performance differences in the short term.¹³ It
 22 follows that he has offered no basis to question the soundness of the fiduciaries’ processes for
 23 maintaining these funds in the Plan.

24 Just last month, the District of Minnesota dismissed with prejudice a similar complaint
 25 challenging the offering of proprietary target date funds in Wells Fargo’s 401(k) plan, on account
 26

27 ¹³ The different strategic asset allocations reflected in the glide paths are the only conceivable
 28 sources of divergent performance, as the LifePath target date funds rely on passive
 management—or “indexing”—for the underlying assets. *See, e.g.*, 2015 RSP Form 5500, at 77–
 79.

1 of deficiencies similar to those here: The plaintiff could not plausibly allege excessive fees
 2 merely by comparing the affiliated options' expenses to two alternatives, nor could the plaintiff
 3 plausibly allege a fiduciary breach by pointing out performance differences between two different
 4 target date funds. *Meiners v. Wells Fargo & Co.*, No. 16-CV-3981, 2017 WL 2303968, at *2–4
 5 (D. Minn. May 25, 2017) (“Taken as a whole, the complaint merely supports an inference that
 6 Wells Fargo continued to invest in affiliated target date funds when its rate of return was lower
 7 than Vanguard, which had a different investment strategy, and that was more expensive than
 8 Vanguard and Fidelity funds. These allegations do not give rise to an inference of a breach of
 9 fiduciary duty.”). Plaintiff does not even allege that much here. These claims fail.

10 **B. Plaintiff Similarly Fails To Plausibly Allege Any Fiduciary Breach In The
 11 Selection And Monitoring Of The Mutual Fund Options He Attacks**

12 The Complaint challenges two BlackRock-affiliated mutual funds included in the
 13 investment lineup during the class period, on distinct but equally meritless grounds.

14 First, plaintiff alleges that the Low Duration Bond Fund was an imprudent selection
 15 because the fund allegedly charged higher fees than and underperformed an allegedly comparable
 16 Vanguard fund. Compl. ¶¶ 154–64. Because plaintiff never personally invested in this fund, he
 17 once again lacks standing to bring this challenge. And even if he had standing, plaintiff's
 18 performance critique would not support his claims because it is based on impermissible hindsight,
 19 and plaintiff cannot support a fee critique based on a comparison to a single cheaper fund. *Supra*
 20 at 10; *Terraza v. Safeway Inc.*, No. 16-CV-03994-JST, 2017 WL 952896, at *12–13 (N.D. Cal.
 21 Mar. 13, 2017) (“The fact that it is possible that some other funds might have had even lower
 22 [expense] ratios is beside the point; nothing in ERISA requires every fiduciary to scour the
 23 market to find and offer the cheapest possible fund (which might, of course, be plagued by other
 24 problems).” (alteration omitted; quoting *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir.
 25 2009)); *White v. Chevron Corp.* (“*White II*”), No. 16-CV-0793-PJH, 2017, 2017 U.S. Dist.
 26 LEXIS 83474, *44–45 (N.D. Cal. May 31, 2017) (similar); *Meiners*, 2017 WL 2303968, at *3–4
 27 & n.4 (similar).

28 More generally, this claim is self-defeating, because plaintiff's own allegations show that

1 he is comparing apples to oranges: the two funds pursue different strategies, and the Vanguard
 2 fund invests in securities with longer duration, which carry higher risk along with potentially
 3 higher reward. Compl. ¶¶ 158–59 (reflecting that the Vanguard fund maintains a duration of
 4 between 1 and 4 years, and that the BlackRock fund maintains a duration of between 0 and 3
 5 years); *see also* *White II*, 2017 U.S. Dist. LEXIS 83474, *29–32 (explaining risks associated with
 6 longer duration funds). Plaintiff’s comparison of the two funds’ fees and performance is thus
 7 meaningless. Plaintiff offers nothing by which to conclude that a fiduciary could not reasonably
 8 select an option with the risk profile and expense ratio of the Low Duration Bond Fund for
 9 inclusion in a diversified investment lineup.¹⁴ *See, e.g.*, 29 C.F.R. § 2550.404a-1(b)(i) (“[A]
 10 fiduciary shall . . . give[] appropriate consideration to those facts and circumstances . . . relevant
 11 to the particular investment or investment course of action involved, including the role the
 12 investment or investment course of action plays in that portion of the plan’s investment
 13 portfolio.”); *Loomis v. Exelon Corp.*, 658 F.3d 667, 670 (7th Cir. 2011) (dismissing challenges to
 14 mutual funds with fees as high as 96 basis points, noting that the expense ratios for these publicly
 15 offered funds “necessarily were set against the backdrop of market competition”).

16 Second, plaintiff alleges that the Investment Committee imprudently included the Global
 17 Allocation Fund (in which plaintiff *did* actually invest) in the Plan lineup because its expense
 18 ratio was allegedly higher than the expense ratio for two similar third party funds, managed by
 19 two insurance companies to which a BlackRock affiliate provided sub-advisory services. Compl.
 20 ¶¶ 139–53. In fact, the overall fees for the Global Allocation Fund were *lower* than the fees for
 21 the third party funds. *See* VerGow Decl., Ex. G (“Feb. 2013 BlackRock Global Allocation Fund
 22 prospectus”), at 171 (showing “Total Annual Fund Operating Expenses” of 88 basis points for
 23 Institutional Shares); *id.* Ex. H (Apr. 2013 Allianz Global Allocation Fund prospectus), at 176
 24 (showing “Total Annual Fund Operating Expenses” of 115 basis points); *id.* Ex. I (Apr. 2013
 25 Jackson Global Allocation Fund prospectus), at 186 (showing “Total Annual Fund Operating
 26 Expenses” of 91 to 111 basis points, depending on share class). Plaintiff is therefore simply
 27

28 ¹⁴ Notably, the Plan *also* included the U.S. Debt Index Fund, a fixed income option that offered
 higher duration (and, with it, the opportunity for higher returns). Compl. ¶ 167.

1 incorrect when he contends that the Plan “could have paid less for the exact same fund and
 2 services by including [the third party funds] in the Plan rather than the BlackRock affiliate,” *see*
 3 Compl. ¶ 152, and this claim collapses accordingly.

4 Plaintiff also suggests that the Investment Committee acted imprudently by failing to
 5 switch the Plan into a collective trust version of the Global Allocation strategy earlier than it
 6 actually did, in 2014. Compl. ¶¶ 140–44. But plaintiff does not allege that BlackRock even
 7 offered a collective trust for this strategy before that date, much less one with a track record that
 8 would have supported a switch. *Cf. White I*, 2016 WL 4502808, at *12 (“It is inappropriate to
 9 compare distinct investment vehicles solely by cost, since their essential features differ so
 10 significantly. In particular, mutual funds have unique regulatory and transparency features, which
 11 make any attempt to compare them to investment vehicles such as collective trusts and separate
 12 accounts an ‘apples-to-oranges comparison.’” (citing *Tibble I*, 729 F.3d at 1134)). This theory,
 13 too, fails.

14 **C. Plaintiff’s Remaining Allegations Do Not Support Any Inference Of
 15 Imprudence Or Disloyalty**

16 Plaintiff offers a few additional attacks, none of which advance his Complaint across the
 17 plausibility threshold. Plaintiff faults BlackRock for failing to include more “passively managed”
 18 investment options. Compl. ¶¶ 169–70. But there is no requirement under ERISA that fiduciaries
 19 offer some particular portion of passive options (or, indeed, any such options)—on the contrary,
 20 courts recognize that fiduciaries may in their judgment select the mix they determine is
 21 appropriate. *Loomis*, 658 F.3d at 673–74 (dismissing claims challenging a fiduciary’s selection
 22 of a mix of higher-cost actively managed funds and lower-cost passively managed funds); *Taylor*
 23 v. *United Techs. Corp.*, No. 3:06cv1494 (WWE), 2009 WL 535779, at *10 (D. Conn. Mar. 3,
 24 2009) (fiduciaries are not required to choose index funds over actively managed funds “so long as
 25 the fiduciary’s decision meets the prudent person standard”), *aff’d*, 354 F. App’x 525 (2d Cir.
 26 2009). Plaintiff offers no basis for second-guessing the mix selected by the fiduciaries here, apart
 27 from the implausible “excessive fee” allegations already addressed. And, in any event, plaintiff
 28 apparently overlooks that the LifePath Funds are composed of passive funds, such that more than

1 half of the options in the Plan lineup follow that investment style. *See, e.g.*, 2015 RSP Form
 2 5500, at 77–79 (reflecting “index” style).

3 Plaintiff also contends that the density of proprietary options in the Plan lineup had the
 4 effect of concentrating systemic risk, citing disclosures in the prospectus for one of the mutual
 5 funds in the Plan lineup. Compl. ¶¶ 171–80. Yet plaintiff offers no reason to believe that this
 6 “systemic risk” somehow injured anyone in the Plan, including himself, and thus the allegation
 7 cannot support any claims for monetary relief. The risk analysis in the Complaint is frivolous in
 8 any event. For one thing, plaintiff muddles the distinct structures housing these investment
 9 strategies—the assets in the mutual funds and collective trusts challenged here are not
 10 commingled together, but rather are invested in independent entities, separated from the assets of
 11 the trustee or management company. *See* Compl. ¶ 83; 15 U.S.C. §§ 80a-4, 80a-5; SEC,
 12 *Investment Company Registration and Regulation Package*, <https://www.sec.gov/investment/fast-answers/divisions/investmentinvcoreg121504htm.html> (last visited May 30, 2017). An investor
 13 thus does not face additional financial risk by investing in multiple funds overseen by a common
 14 investment management company or trustee. For another, it is not plausible that diversifying
 15 across investment management companies or trustees would necessarily have reduced cyber risk,
 16 as opposed to *enlarging* it, by increasing the Plan’s counterparties and thus the odds that one of
 17 them would be subject to a cyber attack compromising sensitive information.

19 Even accepting the Complaint’s characterization of systemic risks affecting 401(k) plans,
 20 plaintiff identifies no reason why the fiduciaries should have prioritized diversification of these
 21 types of risk (though they may be a *permissible* consideration under ERISA) over other
 22 considerations, such as expenses and potential returns, which ERISA expressly *directs* fiduciaries
 23 to consider. *See, e.g.*, 29 U.S.C. § 1104 (stating that fiduciaries must act “for the exclusive
 24 purpose of providing benefits to participants and their beneficiaries and defraying reasonable
 25 expenses”). Ultimately, plaintiff identifies no defect in the fiduciaries’ process for evaluating
 26 these types of risk and no reason to conclude they did not reach their lineup decisions using a

27

28

1 prudent process. This claim also fails.¹⁵

2 **III. PLAINTIFF'S PROHIBITED TRANSACTION CLAIMS SHOULD BE**
 3 **DISMISSED**

4 Plaintiff alleges that the Plan's investment in affiliated funds constituted prohibited
 5 transactions in violation of ERISA § 406(a)(1)(A), (a)(1)(D), (b)(1), and (b)(2), 29 U.S.C.
 6 § 1106(a)(1)(A), (a)(1)(D), (b)(1), and (b)(2). *See* Compl. ¶¶ 214–23. This claim is time-barred,
 7 and it is implausibly alleged.

8 **A. Plaintiff's Prohibited Transaction Claims Are Untimely**

9 Plaintiff's prohibited transaction claims are barred under ERISA's three-year statute of
 10 limitations and six-year statute of repose. 29 U.S.C. § 1113(2).

11 ERISA claims must be brought within three years of the “earliest date on which the
 12 plaintiff had actual knowledge of the breach or violation.” 29 U.S.C. § 1113(2); *see Phillips v.*
13 Alaska Hotel & Rest. Emps. Pension Fund, 944 F.2d 509, 520 (9th Cir. 1991) (“The earliest date
 14 on which a plaintiff became aware of any breach . . . start[s] the limitation period of § 1113[](2)
 15 running.”). A plaintiff is charged with knowledge of information provided in plan disclosures
 16 and other participant communications. *See, e.g., Lorenz*, 2017 WL 952883, at *7 (plaintiff had
 17 actual knowledge “when the [relevant] Participant Disclosure Notice was available to him . . .
 18 regardless of whether [he] actually read the Participant Disclosure Notice” (citing *Brown v.*
19 Owens Corning Inv. Review Comm., 622 F.3d 564, 571 (6th Cir. 2010)); *Sulyma v. Intel Corp.*
20 Inv. Policy Comm., No. 15-CV-04977 NC, 2017 WL 1217185, at *11 (N.D. Cal. Mar. 31, 2017),
21 appeal filed, No. 17-15864 (9th Cir. Apr. 27, 2017) (claims are time-barred when “disclosures
 22 gave [plaintiff] ‘actual knowledge’ of the transactions constituting the alleged violations, and the
 23 disclosures were made more than three years before”).

24 The allegations on which plaintiff builds his prohibited transaction claims—the fees for
 25 the challenged funds, and their affiliation with BlackRock—were all known to plaintiff more than

26 ¹⁵ Plaintiff offers one other barely articulated attack on the Plan's investment options, which is
 27 entirely conclusory and easily dismissed. He alleges that the Total Return Fund in the Plan “is
 28 more expensive than similar alternative non-proprietary options.” Compl. ¶ 165. Plaintiff does
 not identify those options, permitting no meaningful analysis of his claim, and ERISA does not
 require fiduciaries to “scour the market” for the cheapest possible fund anyway. *Supra* at 14.

1 three years before he filed this action, as the participant disclosures to him make clear. *See*
 2 VerGow Decl., Ex. M (“Aug. 2013 Participant Fee Disclosure”), at 246–47. In a participant-
 3 directed plan such as this one, the only “transaction” attributable to the fiduciaries (as opposed to
 4 the plan participants) is the initial inclusion of a fund in the Plan lineup. *See Wright v. Or.*
 5 *Metallurgical Corp.*, 360 F.3d 1090, 1101 (9th Cir. 2004) (explaining that the decision to
 6 “continue to hold” a particular investment is “not a transaction” for § 406 purposes); *David v.*
 7 *Alphin*, 704 F.3d 327, 340–41 (4th Cir. 2013) (the “only action that can support an alleged
 8 prohibited transaction is the initial selection of the affiliated funds”).¹⁶ Every single fund in
 9 which plaintiff himself invested was added to the Plan lineup more than three years before this
 10 lawsuit, as the disclosures to plaintiff showed.¹⁷ That the funds remain in the Plan “impart[s]
 11 nothing materially new” for statute of limitations purposes, because the limitations clock began
 12 ticking on the date plaintiff learned his claims existed. *Phillips*, 944 F.2d at 520; *Lorenz*, 2017
 13 WL 952883, at *7 (“This claim is time-barred regardless of whether the . . . Defendants had a
 14 continuing duty not to engage in prohibited transactions. . . . [T]he three-year statute of
 15 limitations requires the plaintiff’s knowledge to be measured from *the earliest date on which he*
 16

16¹⁶ In this way, a prohibited transaction claim is different from a fiduciary duty to monitor claim, 17 the subject of the Supreme Court’s decision in *Tibble v. Edison International*, 135 S. Ct. 1823 18 (2015). A fiduciary has a continuous duty to monitor plan investments, but a transaction occurs 19 at a particular point in time, as the Ninth Circuit recognized in *Wright*. *White II*, 2017 U.S. Dist. 20 LEXIS 83474, *69 (“[T]here is no such thing as a ‘continuing’ prohibited transaction – as the 21 plain meaning of ‘transaction’ is that it is a point-in-time event.” (citing *Wright*, 360 F.3d at 22 1101)). Either way, a plaintiff may challenge only distinct breaches or distinct transactions 23 occurring within the time permitted under 29 U.S.C. § 1113, as the Supreme Court has confirmed. 24 *Tibble*, 135 S. Ct. at 1829 (recognizing, as to a claim of breach of the duty to monitor, that “so 25 long as the alleged breach of the continuing duty occurred within six years of suit, the claim is 26 timely”).

27¹⁷ Four BlackRock-affiliated funds were added to the Plan lineup within the past three years: the 28 Short-Term Investment Fund, Strategic Income Opportunities Fund, Russell 2000 Alpha Tilts Fund, and Lifepath 2060 Fund. *Compare* Aug. 2013 Participant Fee Disclosure, at 246–47, with 2015 RSP Form 5500, at 77–79. Plaintiff did not allocate his account to any of these funds. *See* Plan Participant Statements. The Complaint also alleges nothing about the first two but their names, Compl. ¶ 66, and plaintiff’s conclusory challenges to the other two funds fail for the reasons discussed *supra* at 10–17. Similarly, while the fiduciaries switched the vehicles for two investment strategies (Global Allocation and Total Return) from mutual funds to collective trusts within the past three years, *supra* at 4, plaintiff’s only complaint about those collective trusts is the fee allegation that fails for the reasons discussed above, *supra* at 11.

1 *or she knew of the breach.”* (quotations omitted and emphasis in original)). His claims are
 2 therefore untimely under ERISA’s statute of limitations.

3 Plaintiff’s prohibited transaction claims are also untimely under ERISA’s statute of
 4 repose. ERISA requires plaintiffs to file suit within six years of the date of the alleged prohibited
 5 transaction. 29 U.S.C. § 1113(1). Every investment option in which plaintiff personally invested
 6 was added to the Plan lineup more than six years before this suit was brought. VerGow Decl.,
 7 Ex. B (2010 RSP Form 5500), at 39; *see* Plan Participant Statements.¹⁸

8 **B. The Complaint Does Not Plausibly Allege Non-Exempt Violations Of The
 9 Prohibited Transaction Provisions He Identifies**

10 ERISA § 406 prohibits certain transactions involving a plan and either a fiduciary or a
 11 party in interest, subject to explicit authorization in § 408 and its implementing regulations of
 12 transactions that meet certain conditions. *See* 29 U.S.C. §§ 1106, 1108. Count II of the
 13 Complaint fails both because plaintiff does not allege that the Plan’s investment in proprietary
 14 funds come within the § 406 prohibitions he cites, and, to the extent § 406 applies at all, because
 15 the investments qualified for the applicable exemptions under § 408.

16 **1. Plaintiff Has Not Plausibly Alleged A Prohibited Transaction With
 17 Respect To The Plan’s Collective Trust Investments**

18 The deficiency of plaintiff’s collective trust fee allegations spells the end of his attempt
 19 even to allege prohibited transaction violations with respect to the Plan’s collective trust
 investments.

20 The Complaint alleges that the Plan’s investment in affiliated funds violated four
 21 subsections of the prohibited transaction statute: § 406(a)(1)(A), (a)(1)(D), (b)(1), and (b)(2). The
 22 collective trust allegations in the Complaint do not describe violations of any of these provisions.
 23 Because the Plan does not pay any investment management fees to BlackRock in connection with
 24 the affiliated collective trust investments, *supra* at 11, the selection of those investments for the
 25 Plan necessarily does not involve “deal[ing] with the assets of the plan in [its] own interest or for

26 ¹⁸ Two other BlackRock-affiliated funds were added within the past six years, beyond the funds
 27 discussed at *supra* n.17—the Low Duration Bond Fund and the Equity Dividend Fund. *Compare*
 28 2011 RSP Form 5500, 56–57, with Aug. 2013 Participant Fee Disclosure, at 246–47. Plaintiff’s
 conclusory allegations with respect to those funds fail for the reasons discussed *supra* at 10–17.

[its] own account" (§ 406(b)(1)), nor does it entail the fiduciaries taking an adverse position to Plan participants in a transaction (§ 406(b)(2)). Insofar as plaintiff alleges (in wholly conclusory terms) that the Plan fiduciaries stood to personally gain when they acted to increase revenues for BlackRock, Inc. (Compl. ¶ 222), it follows that the Plan fiduciaries acted *against* their own interests in selecting these collective trusts, which generated no investment management fees for BlackRock entities whatsoever.¹⁹ Similarly, the inclusion of the fee-free collective trust investments does not transfer to or afford the collective trust manager the use of Plan assets for its own benefit (§ 406(a)(1)(D)), nor does it involve the sale or exchange of any property to the collective trust manager (§ 406(a)(1)(A))—the manager simply *holds* Plan assets and invests them pursuant to the terms of the IMA. *See* IMA at 201; Compl. ¶ 83. The Plan's actual fee arrangement dooms any effort to cast the collective trust investments as prohibited transactions within the meaning of these provisions.

2. Exemptions Plainly Apply To The Plan's Affiliated Investments

ERISA and its implementing regulations expressly permit the offering of affiliated investment products in a plan lineup, where a transaction otherwise comes within the prohibitions of § 406 (for example, where an affiliated investment fiduciary collects fees from plan assets), if certain conditions are met. *See, e.g.*, 29 U.S.C. § 1108(b)(8). The conditions for these exemptions are met here.²⁰

To begin, the Plan's investment in the collective trusts comports with § 408(b)(8), which permits transactions between a plan and a collective trust maintained by a party in interest

¹⁹ The Plan fiduciaries moved from mutual funds to collective trusts for two strategies during the class period. *Compare, e.g.*, Aug. 2013 Participant Fee Disclosure, at 246–47, with Mar. 2017 Participant Fee Disclosure, at 266–67 (reflecting changes from mutual fund to collective trust fees).

²⁰ Some courts have held that plaintiffs do not have to allege the non-application of prohibited transaction exemptions. *Compare Mehling v. N.Y. Life Ins. Co.*, 163 F. Supp. 2d 502, 510 (E.D. Pa. 2001) (dismissing complaint failing to allege exemption 77-3 did not apply), *with Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 676 (7th Cir. 2016) ("[A]n ERISA plaintiff need not plead the absence of exemptions to prohibited transactions."), *and Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 601 n.10 (8th Cir. 2009) (similar). But where, as here, the Complaint itself establishes the *application* of the relevant prohibited transaction exemptions, it fails for basic lack of plausibility. *See, e.g.*, *Allen*, 835 F.3d at 677 (recognizing that prohibited transaction claims are subject to *Twombly/Iqbal* pleading requirements).

1 provided that (1) the transaction is a “sale or purchase of an interest in the fund”; (2) the
 2 transaction is expressly permitted by the plan document or by a fiduciary with authority to
 3 manage and control the assets of the plan; and (3) the manager “receives not more than
 4 reasonable compensation.” Plaintiff himself alleges the first two conditions. *See* Compl. ¶¶ 72,
 5 82–86 (alleging that the investment fiduciaries caused the Plan to offer interests in the collective
 6 trusts). And given that the Plan pays no investment management fees for its collective trust
 7 investments, those (nonexistent) fees necessarily constitute “not more than reasonable
 8 compensation.” *See supra* at 11. Plaintiff’s prohibited transaction challenge to the collective
 9 trusts is thus implausible under this exemption.

10 Plaintiff’s challenge to the mutual funds is likewise foreclosed by Prohibited Transaction
 11 Exemption (“PTE”) 77-3, promulgated by the Department of Labor. PTE 77-3 permits a plan to
 12 offer affiliated mutual funds, provided that the “dealings between the plan and the affiliated fund
 13 [is] ‘on a basis no less favorable to the plan than such dealings are with other shareholders,’ the
 14 plan does not pay redemption fees or sales commissions in connection with the sale or acquisition
 15 of its shares, and the plan pays no distinct investment advisory fee to the mutual fund (though the
 16 mutual fund may pay such fees to its managers). *Leber v. Citigroup, Inc.*, No. 07 CIV. 9329
 17 (SHS), 2010 WL 935442, at *10 (S.D.N.Y. Mar. 16, 2010) (quoting PTE 77-3, 42 Fed. Reg.
 18 18,734–35). Here, the Plan paid no fees to the mutual fund beyond the mutual fund’s expense
 19 ratio,²¹ and because the Plan selected the lowest-cost share class for the challenged mutual
 20 funds,²² it necessarily received terms no less favorable than other shareholders did. Plaintiff’s
 21 prohibited transaction challenge to the mutual funds is thus also implausible.

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24 ²¹ Compare, e.g., Aug. 2013 Participant Fee Disclosure at 247 (noting Global Allocation Fund fee
 25 of 88 basis points), with Feb. 2013 BlackRock Global Allocation Fund prospectus at 171 (noting
 26 fee of 88 basis points); and Ex. N (Oct. 2016 Participant Fee Disclosure), at 256 (noting Low
 Duration Bond fee of 42 basis points), with Ex. F (“2016 Low Duration Bond Fund Prospectus”)
 27 at 166 (noting fee of 42 basis points).

28 ²² See Feb. 2013 BlackRock Global Allocation Fund prospectus (BlackRock participant fee
 associated with lowest share class); 2016 Low Duration Bond Fund Prospectus (BlackRock
 participant fee associated with lowest-expense share class).

1 **IV. IMPROPER DEFENDANTS SHOULD BE DISMISSED FROM THIS ACTION**

2 The Complaint names two defendants who do not belong in this case. The first is Jason
 3 Herman, an employee in BlackRock, Inc.’s human resources department. The caption in the
 4 Complaint identifies Mr. Herman as the “plan sponsor”; the body of the Complaint alleges, in
 5 contrast, that Mr. Herman simply served on the Retirement Committee during the putative class
 6 period. *Compare* Compl. at 1, with *id.* ¶ 48(a). Either way, neither allegation supports retaining
 7 Mr. Herman in this suit, because no claims are asserted against either the “plan sponsor” or the
 8 Retirement Committee. While the Complaint does expressly assert claims against two
 9 *subcommittees* of the Retirement Committee, it does not allege that Mr. Herman served on either
 10 of those subcommittees (he did not), or that he otherwise had any role in the decisions challenged
 11 in this lawsuit. “A plaintiff suing multiple defendants must allege the basis of his claim against
 12 each defendant” to satisfy Fed. R. Civ. P. 8 pleading standards. *Flores v. EMC Mortg. Co.*, 997
 13 F. Supp. 2d 1088, 1103 (E.D. Cal. 2014) (quotation omitted); *see, e.g., IATSE Local 33 Section*
 14 *401(K) Plan Bd. of Trs. v. Bullock*, No. CV 08-3949 AHM, 2008 WL 4838490, at *3 (C.D. Cal.
 15 Nov. 5, 2008) (rejecting ERISA claims that “lump[ed] together the various defendants as if all
 16 were culpable for every supposed ERISA violation”); *Bryant v. Tulare Cty.*, No. 1:16-CV-1542-
 17 LJO-SKO, 2016 WL 6996476, at *2 (E.D. Cal. Nov. 29, 2016) (dismissing claims where the
 18 plaintiff failed to allege “the specific wrongful acts that each Defendant performed and how each
 19 Defendant either caused Plaintiff harm or is responsible for Plaintiff’s harm”). Because Mr.
 20 Herman is not named on any count in the Complaint and the allegations against him do not
 21 support extending plaintiff’s claims to him, he should be dismissed from this case.

22 The Complaint also does not support claims against BTC, which is named as a defendant
 23 to plaintiff’s prohibited transactions claim in Count II. *See* Compl. ¶¶ 39, 215–220, 224. Plaintiff
 24 does not allege that BTC had any role in the composition and monitoring of the Plan’s investment
 25 lineup, as a fiduciary or otherwise. Compl. ¶ 40. Plaintiff simply alleges that BTC manages the
 26 collective trusts in the Plan, and that as a party in interest to the Plan it should be required under
 27 29 U.S.C. § 1132(a)(3) to disgorge any fees received from the Plan and to restore the Plan’s
 28 alleged losses. Compl. ¶¶ 39, 40, 224. In addition to the deficiency of plaintiff’s prohibited

1 transaction claims generally and the fact that BTC was *paid no investment management fees* for
 2 the Plan’s collective trust investments—obstacles that are discussed at length above—plaintiff’s
 3 claims against BTC fail for two additional reasons. First, plaintiff does not allege (even in
 4 conclusory terms, much less plausible ones) that BTC “knowingly participated” in the Plan
 5 fiduciaries’ alleged violations; he accordingly cannot subject BTC to suit as a party in interest.
 6 *See Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 248 (2000)
 7 (recognizing that ERISA permits suits against parties in interest who *knowingly participate* in
 8 fiduciary breaches). Second, plaintiff is not seeking “appropriate equitable relief” from BTC
 9 within the compass of 29 U.S.C. § 1132(a)(2). A claim for restitution under that provision must
 10 be “traced to particular funds or property in the defendant’s possession.” *Great-West Life &*
 11 *Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002). In seeking the recovery of plan losses
 12 and the disgorgement of fees that, if they had been paid at all, would have been commingled with
 13 BTC’s general assets, plaintiff is effectively seeking money damages, a “classic form of legal
 14 relief” that is not available against nonfiduciaries under ERISA. *Mertens v. Hewitt Assocs.*, 508
 15 U.S. 248, 255 (1993).

16 **V. PLAINTIFF’S DERIVATIVE MONITORING-FIDUCIARY AND**
 17 **CO-FIDUCIARY BREACH CLAIMS FAIL**

18 The derivative claims in Counts III and IV of the Complaint depend entirely upon
 19 plaintiff’s fiduciary breach claims, and they fail along with those underlying claims.

20 In Count III, plaintiff alleges that BlackRock, Inc. failed to monitor the fiduciary
 21 committees’ exercise of their duties. Compl. ¶¶ 226–32. This monitoring-fiduciary claim derives
 22 from plaintiff’s allegation that the fiduciary committees did not prudently and loyally select and
 23 monitor the options in the Plan’s investment lineup. *See id.* ¶ 232 (asserting that BlackRock, Inc.
 24 failed to intervene to address the committees’ alleged fiduciary breaches). Because plaintiff has
 25 not plausibly alleged any underlying breach by the fiduciary committees, as established above, his
 26 challenge to the supervision of those committees is likewise implausible and must be dismissed.
 27 *See, e.g., In re HP Erisa Litig.*, No. C-12-6199 CRB, 2014 WL 1339645, at *8 (N.D. Cal. Apr. 2,
 28 2014) (dismissing derivative failure-to-monitor and co-fiduciary breach claims along with

1 underlying prudence and disclosure claims); *Romero v. Nokia, Inc.*, No. C 12-6260 PJH, 2013
2 WL 5692324, at *5 (N.D. Cal. Oct. 15, 2013) (same).

3 Plaintiff's co-fiduciary breach claim must be dismissed for similar reasons. Plaintiff
4 alleges in Count IV that BlackRock, Inc. and the Administrative Committee were co-fiduciaries
5 of the Investment Committee, and that they are liable under 29 U.S.C. § 1105 for the Investment
6 Committee's alleged breaches in composing and monitoring the Plan's investment lineup.
7 Compl. ¶¶ 242, 246. But “[c]o-fiduciary liability can only attach to live primary liability.”
8 *Sulyma*, 2017 WL 1217185, at *11; *accord In re HP Erisa Litig.*, 2014 WL 1339645, at *8;
9 *Romero*, 2013 WL 5692324, at *5. With no plausible allegation of a breach by the Investment
10 Committee, plaintiff's effort to derive co-fiduciary liability from such a breach founders.

11 CONCLUSION

12 The Court should dismiss the Complaint with prejudice.

13 Dated: June 1, 2017

O'MELVENY & MYERS LLP

14
15 By: /s/ Brian D. Boyle
16 Brian D. Boyle
17 Attorneys for Defendants
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